JUN 7 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 1066

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
Petitioners,

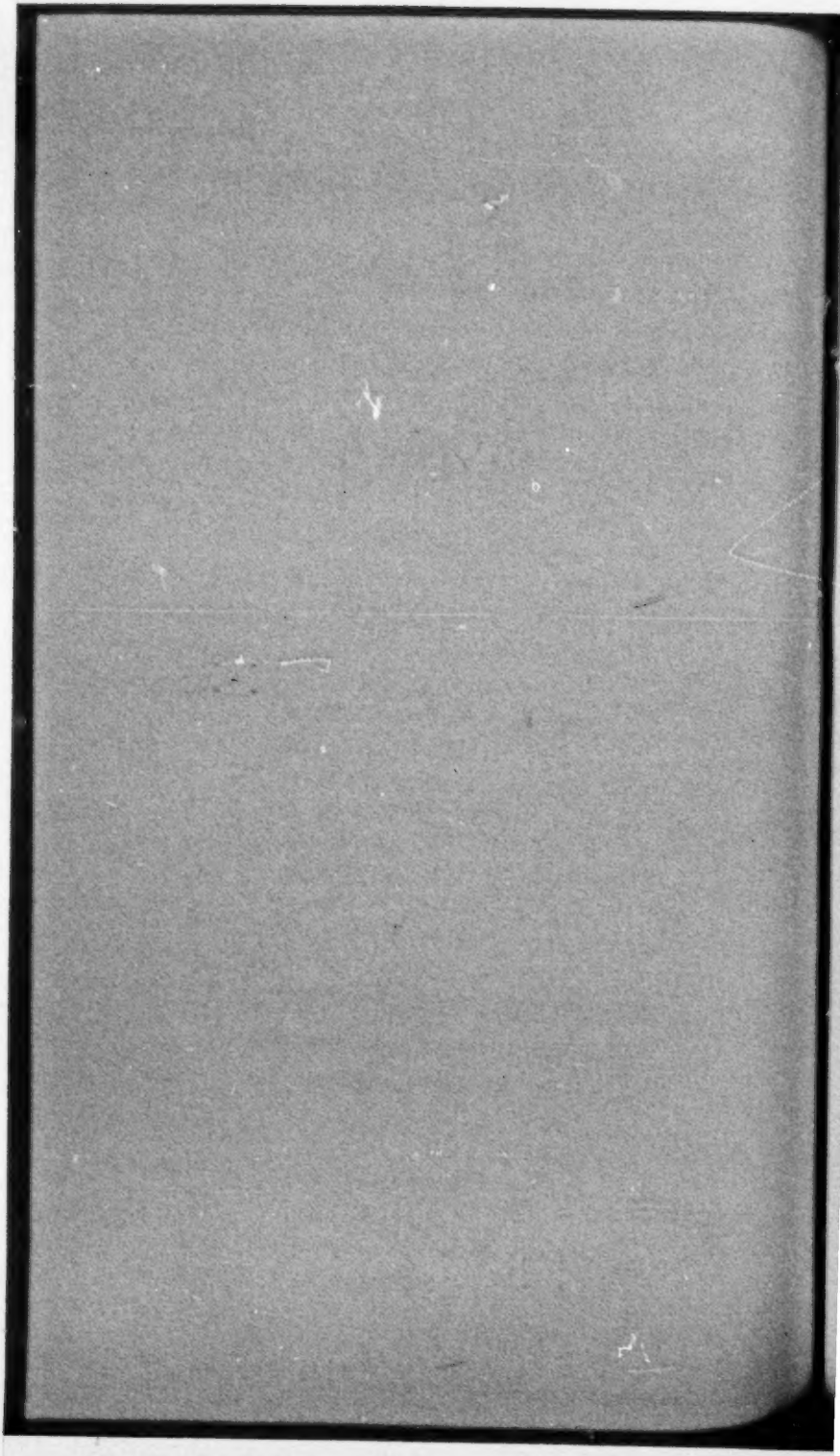
vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

BELL, SANDERS & TALLMAN,
BAILEY E. BELL.
Central Building, Anchorage, Alaska,
Attorneys for Petitioners,

Parker-Walton Printing Co., San Francisco, California



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No.

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
Petitioners,

vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Your Petitioners, J. C. Reynolds and Agnes M. Reynolds, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Ap-

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peals for the Ninth Circuit, entered on April 4, 1957, and the final judgment denying the Petition for Rehearing, which order denying Petition for Rehearing was made and entered in said Court on May 7, 1957.

The Opinion is not yet officially published and reported but a copy of the Opinion, filed on April 4, 1957, is attached hereto and made a part of this Petition for Writ of Certiorari by reference and the judgment and record is printed and made a part hereof as an appendix hereof.

STATEMENT OF MATTERS INVOLVED.

This action was filed by Petitioners J. C. Reynolds and Agnes M. Reynolds, in the District Court for the Territory of Alaska, Third Division, for the purpose of preventing a threatened forfeiture of a conditional sales contract for the purchase of the Yah Sure Club in Homer, Alaska, which grew out of a conditional sales contract which was originally executed by Raymond V. Lentz and Shirley Lentz for the sale of said property to Mr. and Mrs. Westergard, who are not parties to the action; which contract of purchase reached the possession and ownership of J. C. Reynolds and Agnes M. Reynolds.

On this contract for a Twenty Thousand Dollar ($20,000.00) purchase, the purchase price had all been paid except the sum of Seven Thousand Five Hundred Sixty-eight Dollars and Twenty-nine Cents ($7,568.29), and a new contract was entered into between Raymond V. Lentz and Shirley Lentz as Sellers and

J. C. Reynolds and Agnes M. Reynolds as Buyers, wherein the Reynolds paid in cash One Thousand One Hundred Nine Dollars and Seven Cents ($1,109.07) and agreed to make payments of One Hundred Fifty Dollars ($150.00) per month until the balance of Six Thousand Four Hundred Fifty-nine Dollars and Twenty-two Cents ($6,459.22) was paid, and to keep the property insured in the sum of Six Thousand Five Hundred Dollars ($6,500.00). The payments were to start July 1, 1954, but, before anything was due, large amounts of money were paid to the defendants Lentz, and, prior to the attempted forfeiture, the balance had been reduced by the payment of One Thousand Nine Hundred Twenty-nine Dollars and One Cent ($1,-929.01), in addition to the down payment of One Thousand One Hundred Nine Dollars and Seven Cents ($1,109.07). The agreement of sale and purchase was to be deposited by the Sellers in the Bank of Homer at Homer, Alaska, where the payments were to be made and the insurance policy to be delivered. *The Sellers did not make the deposit of the agreement in the Bank of Homer on the 8th day of April, 1954, as agreed, but did, about six months later, and in September of 1954, take the agreement to the Bank.* The payments were paid well in advance to Mr. Lentz, but the insurance policy was not issued until in October of 1954, and then only in the sum of Five Thousand Five Hundred Dollars ($5,500.00). The evidence on the plaintiff's part was to the effect that the Seller, Raymond V. Lentz, was drinking some, and wanted money shortly after the execution of the agreement, even though none was due, and that, on one occasion, he

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wanted Five Hundred Dollars ($500.00), and that J. C. Reynolds told him he couldn't let him have it because he had to buy the insurance with it, and that Lentz, by agreement, waived the issuance of the policy, stating that the building was then unoccupied, that he needed the money badly and that the insurance could be purchased later. Reynolds gave him the Five Hundred Dollars ($500.00), and did not buy the insurance policy until October, and by that time the equity of Raymond V. Lentz and Shirley Lentz had been reduced to where the equity did not equal Five Thousand Five Hundred Dollars ($5,500.00) and a policy, with the contract clause in it, for that sum was purchased and taken to the bank, and another policy of Five Thousand Five Hundred Dollars ($5,500.00) was purchased, with the contract clause in it also, payable to Raymond V. Lentz and Shirley Lentz, but was not deposited in the Bank.

Then Mr. and Mrs. Lentz were offered Ten Thousand Dollars ($10,000.00) for the property, if they could get it back from Reynolds. Then Raymond V. Lentz went to the Bank of Homer and demanded the papers, representing that the terms of the contract had been breached by failure to make the payments as provided in the agreement, and orally told Reynolds of his demand, and Reynolds immediately went to the Bank and made additional payments. All of this is in the record in the case. The cancelled checks and receipts are all before this honorable Court.

The case was set for trial in Anchorage, Alaska, and the following took place:

Judge Denman of the Ninth Circuit Court of Appeals assigned the Honorable Edward P. Murphy, who was a regular United States District Judge in the Northern District of California, here to Anchorage to hold a term of Court, assisting the regular Third Division District Judge, the Honorable J. L. McCarrey, Jr. This case came up before Judge Murphy on a Motion for Summary Judgment for the defendants and a Countermotion for Summary Judgment for the plaintiffs. Judge Murphy heard some evidence, a transcript of which is included in the record appended hereto. He decided the case against the plaintiffs and forfeited the contract and ordered the property returned to the defendants, and even rendered a money judgment in favor of the defendants against the plaintiffs.

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the decision complained of was rendered therein on the 4th day of April, 1957. A Petition for Rehearing was immediately filed, and was overruled on May 7, 1957.

JURISDICTION.

The jurisdiction of the Court of Appeals was set forth in the Brief, and admitted in the Answer Brief. Jurisdiction is conferred upon this Court to review this cause by Writ of Certiorari, by Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c 646, Sections 1254, 2101, 62 Statutes 828, 961, 28 U.S.C.A. 1254, 2101) and Rules 21, 22 and 23 of the Revised

Rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and other Court rules.

REASONS FOR GRANTING THE WRIT.

First Reason. This case involved the legality of the order of the Chief Judge of the Circuit Court of Appeals sending in a regular United States District Judge to hold court in the DISTRICT COURT OF THE TERRITORY OF ALASKA, which is not a District Court of the United States and has been so held by this Court in *McAllister v. United States*, 141 U.S. 174, *United States v. Burroughs*, 289 U.S. 159-163, and *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582-640, and this is a question of great importance to the people of Alaska, and the Circuit Court did not decide it on the law effecting the power of the Chief Judge to make the order assigning Judge Murphy to Alaska, but avoided deciding that question, when it was raised in the District Court of the Territory of Alaska, as well as in the Circuit Court of Appeals, and briefed on both sides. If he had no legal power to make the order, it was illegally made, and the Honorable Edward P. Murphy was without any jurisdiction, not a Judge de jure or a Judge de facto, and jurisdiction could not be created by waiver or estoppel. The whole question is undecided, and should be determined now by this Honorable Court and the question settled forever.

Second Reason. The decision is contrary to the decisions of the Supreme Court of the United States and many other respectable Courts.

Third Reason. The order made, assigning the Honable Edward P. Murphy to hold a term of court in Alaska, or to help the regular judge of the District Court of the Territory of Alaska in the Third Division, was beyond the powers of the Chief Judge of the Ninth Circuit Court of Appeals, and, there being no power to make the assignment, no jurisdiction was conferred, and, there being no law to authorize the assignment of Judge Murphy, the lack of jurisdiction could not be waived and jurisdiction could not be created by waiver or estoppel, the law making power being in Congress.

Fourth Reason. The District Court of the Territory of Alaska has been held by this honorable Court not to be a District Court of the United States (see citations in First Reason), and the Act authorizing the Circuit Court to assign District Judges of its Circuit, does not in any way authorize said Circuit Court to assign an outside Judge to hold court in the Territorial District Court of Alaska, which Court was created by an Act of Congress and was named and designated as the District Court of the Territory of Alaska, and the Judges are not Judges of the United States District Courts—they are appointed by a special Act, for a four-year term, and have a different jurisdiction from the District Courts of the United States.

Fifth Reason. While this action was still in the District Court of the Territory of Alaska, a Motion to Set Aside any and all orders made or any judgment rendered therein by the Honorable Edward P. Murphy, and to grant a new trial, was duly filed and came

on for hearing, and the Honorable Edward P. Murphy denied the Motion and entered the judgment as a judgment of the District Court of the Territory of Alaska, when he had no jurisdiction whatever in the premises.

Sixth Reason. This was commenced, prosecuted and determined as an equity action, equity being done by the Petitioners here, and equity being denied the Petitioners, which constituted deprivation of property without due process of law.

Seventh Reason. While the action was still pending in the District Court for the Territory of Alaska, the plaintiffs objected to the proposed Decree and to the Findings of Fact and Conclusions of Law in the case, and to the jurisdiction of Judge Murphy, and their objections were overruled and the Findings of Fact, Conclusions of Law and Decree, prepared by the defendants, were duly signed and filed as a judgment of the *District Court of the Territory of Alaska.*

Eighth Reason. All of these matters were raised in the District Court of the Territory of Alaska, were raised again in the Ninth Circuit Court of Appeals, and were at all times denied by the Court; and the plaintiffs, the Petitioners here, feel aggrieved by the decisions of the District Court and of the Ninth Circuit Court of Appeals; and, in good faith, they feel that justice has been denied them, that their property has been taken without due process of law, also against all of the rules of equity and justice, and in contravention of the Opinions and Decisions of the United States Supreme Court, and they petition this

Court for relief by granting Petition for Writ of Certiorari.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Honorable Edward P. Murphy was, at all times mentioned herein, a regular United States District Judge of the Northern District of California, located at San Francisco, regularly appointed, qualified and acting as such, there being no law that justifies or authorizes his being assigned, or acting as, a District Judge of the Courts of the Territory of Alaska, which is a separate, distinct and different Court from the District Courts of the United States.

The District Courts of Alaska were created by an Act of Congress, 48 U.S.C.A. 101, which established and named the Court THE DISTRICT COURT FOR THE TERRITORY OF ALASKA. The Act gave it concurrent jurisdiction with District Courts of the United States, and in addition, general jurisdiction in divorce cases, civil, criminal, equity and admiralty cases, regardless of the amount involved, citizenship or other restrictions, provided a different salary from that of judges of the United States District Courts, and specifically provided "EACH OF SAID JUDGES MUST RESIDE IN THE DIVISION OF THE DISTRICT TO WHICH HE MIGHT BE RESPECTIVELY ASSIGNED BY THE PRESIDENT." Congress divided Alaska into four Divisions, First, Second, Third and Fourth, and outlined them in Section 101 above mentioned.

Section 112, U.S.C.A. 48, provides for the judges to be appointed for a period of four years by the President of the United States, with the advice and consent of the Senate.

Chapter 130, Title 28, Section 292, U.S.C.A., provides for the Chief Judge of the Circuit to designate any district Judge of the Circuit to hold Court IN ANY DISTRICT WITHIN THE CIRCUIT.

Chapter 13, Section 333, Title 28, provides for the calling of conferences of all of the District Judges of the Circuit who are residing WITHIN THE CONTINENTAL UNITED STATES (and Alaska has repeatedly been held not to be within the continental United States).

Chapter 21, Section 451, Title 28, U.S.C.A., states:

> "The term District Court and District Courts of the United States means the courts constituted by Chapter 5 of this title."

and Chapter 5 designates and outlines the District Court fully and completely and *DOES* include in that list Hawaii, the District of Columbia and Porto Rico, but DOES NOT include Alaska or the District Courts of Alaska in any way. Therefore, we state there is no statute authorizing any Court to assign a regularly appointed, qualified and acting judge of the United States District Court to hold court in Alaska, any more than he could assign a State Court Judge from the States of Washington, Oregon or California to hold court in Alaska. Alaska is a separate jurisdiction, created by Congress and not by the Constitution of the United States as the United States District

Courts are. It is not even called or named a United States District Court, but is specifically named by Congress, its creator, as the District Court for the Territory of Alaska. This is also clearly shown by Chapter 17, Section 373, Title 28, U.S.C.A.

Section 134, Chapter 5, provides (a) the District Judges, except in Hawaii and Porto Rico, shall hold office during good behavior. This Section also excludes Alaska completely. You will find, under Definitions, that the District Courts of Alaska are not United States District Courts (see Section 451, Chapter 21, Title 28, U.S.C.A., page 462) but it specifically states: The term "Court of the United States" includes the Supreme Court of the United States, Courts of Appeal, District Courts constituted by Chapter 5 of this Title, including the District Courts of the United States for the Districts of Hawaii and Porto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and any Court created by Act of Congress, the judges of which are ENTITLED TO HOLD OFFICE DURING GOOD BEHAVIOR. An examination of Chapter 5 above referred to reveals that it specifically omits Alaska and the Judges thereof.

This honorable Court has held in the past, that the District Courts for the Territory of Alaska are not United States District Courts.

The first case directly in point is *McAllister v. United States,* 141 U.S. 174, which states "to be the Judge of the District Court of the District of Alaska is not a Judge of the Court of the United States"

and, in the body of the opinion, on page 184, there are several statements supporting the quotation above. This same position is taken by this Court in 289 U.S. 163 and 337 U.S. 640 above cited. Therefore, there being no statutory law authorizing the Chief Judge of the Circuit Court of Appeals to assign Judge Murphy to Alaska to hold Court as District Judge of the Territory of Alaska, he had no jurisdiction here, and jurisdiction cannot be created by waiver or estoppel, and therefore, he had no jurisdiction at all, and any act done by him while here was an absolute nullity, and, to allow his judgment to stand, is a deprivation of the plaintiffs' property without due process of law, as prohibited by the Constitution of the United States of America.

SUPPORTING SECOND CONTENTION WHY THE WRIT SHOULD BE GRANTED.

This is an equity action, and the old maxim that, "he who comes into a Court of Equity must come with clean hands" and the defendants' hands being slimy with fraud and having obtained the Deed and Contract from the escrowee by misrepresentation, by claiming that the payments had not been made, when the defendants knew that the payments were made in advance, and after more than 2/3 of the purchase and sale price of the property had been received by the Sellers, the Defendants herein, and the balance due on the contract of purchase having been tendered in open court, and on the theory that "equity abhors a forfeiture", the Decree of Judge Murphy is in direct violation of all of the equitable decisions of this hon-

orable Court, and was especially opposed to the equity decision of the Honorable Anthony J. Dimond, a District Court opinion in the case of *Skellinger v. Fox,* which decision was affirmed by the Ninth Circuit Court of Appeals in *Fox v. Skellinger,* 216 Fed. 2d 534.

It is to be noted that, in the case at bar, the Circuit Court of Appeals' decision is based upon the failure of the plaintiffs to procure and deposit the insurance policy in the Bank of Homer, and the undisputed fact is that the insurance was purchased on the 10th day of October, which was three days prior to the defendant Lentz even attempting to declare the contract forfeited, and, with no written notice of his intention to forfeit the contract being served, giving the purchasers a chance to meet any requirement that Lentz complained of, amounted to an unauthorized act of forfeiture on the part of Lentz. The undisputed fact is that Lentz made an oral request that the insurance be purchased, on the 10th day of October, 1954, and that immediately an insurance policy was purchased, in the sum of Five Thousand Five Hundred Dollars ($5,500.00), with the acquiescence of Raymond V. Lentz, which was more than adequate to cover any balance due on the purchase price of the property. All of these things are established by the evidence in this case, and, in equity and good conscience, the Court should grant relief to innocent purchasers, such as J. C. Reynolds and Agnes M. Reynolds were and are in this case.

This case, due to the effect it will have on the assigning of judges to the Territory of Alaska, was very

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important, and the Circuit Court of Appeals made an order submitting the case on typewritten record and briefs, which was done, and therefore the record and briefs are not printed, but Petitioners offer to have them all, or any part thereof, printed and submitted upon order of this Court.

55 Am. Jur. 1020, Sec. 637:

> "... While it is beyond question that a vendor may by his words or affirmative acts preclude himself from insisting upon an immediate forfeiture ..."

which the record shows happened here.

The course of proceedings indulged in by both of the parties, shows Mr. Lentz obtained from the Buyer, Reynolds, Petitioner herein, a considerable sum of money in advance of any payments being due, and the evidence conclusively shows that Lentz received the money and then entered into the conspiracy with Henry Anderson whereby he deeded the sold property to Henry Anderson, whereby he was to get Ten Thousand Dollars ($10,000.00) for the transaction, and did attempt to work a forfeiture and was apparently able to get the Contract and Deed out of the Bank of Homer (however, it was later recovered by the Bank of Homer). If his position was tenable, he should then have given notice to Reynolds in writing, giving him a reasonable time to meet what he contended to be breaches of the contract. This was never done — not even in the slightest — and in support of that statement we call your attention to *United States v. Stott, et ux,* 140 F. (2d) 941, and, from page 944, we quote:

"Where the vendee in an executory contract for the purchase of land is entitled to a reasonable time for completion of the transaction and steps towards completion have been taken, the vendor cannot put an end to the contract without notice to the other party of his intention so to do, after which the party in default has a reasonable time in which to perform his obligations under the contract . . . . Moreover, the right to abrogate a contract may be waived by continuing to treat it as a subsisting obligation, as the appellees did here, by their insistence upon performance and their willingness to accept it until the date of attempted abrogation. * * *"

We contended in the court below, and contend here, that there was a definite waiver of the terms of the contract with relation to insurance which was positively made by the Sellers, and we call your attention to *Boswell v. United States,* 123 F. (2d) 213. In this case the Court said:

"In such a case where time is not of the essence, one wishing to rescind for delay must give notice of his intention so to do and allow a reasonable time . . . *Even where time is of the essence, it may be waived and where as here, it has been, notice of intention and reasonable time to perform must be given.* * * *" (Emphasis ours.)

We will not extend this brief by citing the many State Court decisions, but we contend the universal rule is that where time is of the essence and the Buyer has defaulted on payments when due, and the condition is waived, the Buyer has a reasonable time in which to perform before forfeiture can take place,

and NOTICE MUST BE GIVEN BY THE SELLER TO THE BUYER THAT HE IS IN DEFAULT.

Other cases holding the same, or similiar, position are *Community Industrial Land Co. v. Walker*, 142 P. (2d) 757:

> "... *and it was therefore necessary for the respondent to give notice to the appellant before it could again require strict performance or claim a forfeiture for failure in that regard.*" (Emphasis ours).

Another California case, *McLane et al v. Van Eaton, et al*, 141 P. (2d) 783, where there was a slack method used, the Court held "that the forfeiture could not be declared without giving notice and an opportunity to correct."

This is also true in *Grider v. Turnbow*, 94 P. (2d) 285. This is the most elaborate opinion on the question that we have been able to find.

In *Bulmon, et ux v. Bailey, et al*, 156 P. (2d) 231, time of payment was waived, and, to restore it, notice was necessary. This is the rule in the following cases also:

Miller v. Smith, 267 N.W. 862;
Bemmelyn v. Moss, et al, 197 A. 6;
Kerney v. Johnson, 144 A. 808;
In re Schilling, 26 F. Supp. 248;
Branch v. Lee, 159 S.W. (2d) 677;
Rynhart v. Welch, et al, 65 P. (2d) 1420;
Scott v. Molter, 119 S.W. (2d) 603.

Also *Hall v. Nordgren*, 81 P. (2d) 857, from which we will quote a small portion from page 859:

> "It is settled in this jurisdiction that if a vendor has waived strict performance of a contract, *the forfeiture of the contract cannot be claimed without notice and a reasonable opportunity given to perform . . .* " (Emphasis ours).

This is supported by *Young v. Fitts*, 157 S.W. (2d) 873, and *Clayton v. Fletcher Savings & Trust Company*, 155 N.E. 539, which holds that forfeiture is a harsh remedy, not favored in equity. Also *Hill, et al v. Rogers, et al*, 99 N.E. (2d) 270, *Coca Cola Company v. Dixie Cola Laboratories, Inc.*, 30 F. Supp. 275, and *United States v. Smith*, 95 F. Supp. 623.

We therefore respectfully petition this honorable Court to grant the Writ of Certiorari prayed for herein.

Dated, Anchorage, Alaska,
May 16, 1957.

J. C. REYNOLDS,
AGNES M. REYNOLDS,
Petitioners.
BELL, SANDERS & TALLMAN,
By BAILEY E. BELL.
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
Appellants,

vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
Appellees.

No. 15,409
Apr. 4, 1957

On appeal from the District Court for the District of Alaska—Third Division

Before POPE, BARNES and HAMLEY, Circuit Judges.

PER CURIAM.

This action was brought by the plaintiffs-appellants for the purpose of establishing and enforcing as against the defendants-appellees the rights of the plaintiffs to the performance of a contract for the sale of real property between the plaintiffs as vendees and the defendants Lentz as vendors. The court

below found that the plaintiffs were in default under the contract; that the vendors had properly terminated it because of such default; that plaintiffs had lost all rights under the contract; and that the defendants were entitled to possession of the property and to recover from the plaintiffs the sums which the latter had collected in the way of rentals. Judgment was entered accordingly.

Upon this appeal appellants assert: (1), that the judgment was void because the judge before whom the case was tried had no jurisdiction to sit as a trial judge in the Territory of Alaska and had no jurisdiction in the case; and (2), that the findings that the plaintiffs were in default under the contract were clearly erroneous.

The record shows that the case was tried before the Honorable Edward P. Murphy, a District Judge of the Northern District of California, who had been assigned and designated to sit and hold court in the District of Alaska by the Chief Judge of the Ninth Circuit pursuant to the provisions of Title 28 USCA §292(b).[1] The appellants after trying the case before the designated Judge and finding themselves unsuccessful, contended upon motion for new trial that the trial judge had no jurisdiction and that his action was wholly void because it was not within the power of the Chief Judge of the Circuit to make such an assignment. The contention is that the provisions of

[1] §292(b): "The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit."

§292(b), supra, can have no application to the district court for the District of Alaska since the latter court is neither a "district court" nor a "district court of the United States" within the meaning of that section because §451 of Title 28 USCA provides that as used in that Title: "The terms 'district court' and 'district court of the United States' means the courts constituted by Chapter 5 of this Title." The court below is not one of the courts listed in Chapter 5.

We have no occasion to express any view as to this contention of the appellants for it is well settled that they have no standing to question the validity of the designation of Judge Murphy or his right to sit as a Judge in the court below. McDowell v. United States, 159 U.S. 596; Ball v. United States, 140 U.S. 118; Ex Parte Ward, 173 U.S. 452.

While appellants also contend that the court's findings were erroneous, we note that we are not obliged to consider that contention because appellants' brief has failed to contain the specification of errors required by the provisions of our Rule 18. Notwithstanding this failure, we have nevertheless considered appellants' argument that the court erred in finding plaintiffs in default under their contract.

The court is of the opinion that there is no error in this respect. The contract provided that time was of essence here and that the sellers, defendants here, should be released from all obligations to convey the property in case of the failure of the buyers to make any of the payments when due or to perform any of the covenants contained in the contract. The record

shows and the court found that although the contract was made on the 8th day of April, 1954, and required the purchasers to keep the buildings on the property described in the contract insured in standard insurance companies to be approved by the sellers, in an amount not less than $6500, with loss payable to the sellers, and to deliver the insurance policies to the escrow holder, yet no policies were procured until October 10, 1954, and then only in the amount of $5500, and these were never deposited with the escrow holder. The sellers elected to terminate the contract on October 11, 1954.

We find no error in the judgment of the court below and accordingly it is affirmed.

(Endorsed:) Per Curiam Opinion. Filed April 4, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 15,409

J. C. Reynolds, et al.,
Appellants,
v.
Raymond V. Lentz, et al.,
Appellees.

JUDGMENT

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment.
Filed and Entered: April 4, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 7, 1957

Before: POPE, BARNES & HAMLEY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed May 3, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

JUN 1
JOHN T. F

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 1066

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
Petitioners,

vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

DAVIS, HUGHES & THORSNESS,
EDWARD V. DAVIS,
Room 214, Lousac-Sign Building, Anchorage, Alaska,
Attorneys for Respondents Raymond V. Lentz and Shirley Lentz.
RALPH E. MOODY,
Attorney for Respondents Bank of Homer and William L. Mathews.
J. EARL COOPER,
Attorney for Respondents Henry Anderson and Eni Anderson.

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In the Supreme Court

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No.

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
Petitioners,

vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

STATEMENT AS TO PROCEEDINGS AND RECORD.

This matter arose out of a written contract for sale of real estate situated at Homer, Alaska. The contract

was executed on the 8th day of April, 1954, between the respondents Raymond V. Lentz and Shirley Lentz, as sellers, and petitioners J. C. Reynolds and Agnes M. Reynolds, as buyers.

Petitioners as plaintiffs commenced an action in the District Court for the District of Alaska, Third Judicial Division, against the respondents Raymond V. Lentz and Shirley Lentz, as sellers, and against the Bank of Homer, the escrow holder, and against William L. Mathews, a former agent of the escrowee bank. Subsequently on motion of the petitioners, as plaintiffs, Henry Anderson and Eni Anderson were joined as parties defendant as subsequent purchasers of the property described in the contract.

Under date of April 21, 1956, the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, designated and appointed the Honorable Edward P. Murphy, United States District Judge for the Northern District of California, to sit in the United States District Court for the District of Alaska for the month of August, 1956, and for such further time as might be required to complete unfinished business. This order was entered in the journal of the District Court for the District of Alaska on April 23, 1956.

On July 11, 1956, the District Court for the District of Alaska set the cause of Reynolds v. Lentz, et al. for trial before the Honorable Edward P. Murphy, visiting judge, for August 30, 1956. By subsequent orders the trial of the matter was continued until October 24,

1956. On that day the matter was tried to the Honorable Edward P. Murphy.

By motion and consent of all parties made and given in open court the matter was tried on the record as it then stood, including the pleadings, interrogatories propounded to the various parties and the answers thereto, and request for admissions and the answers thereto and upon the oral testimony taken at the time of the trial.

During argument on motion for judgment, prior to the introduction of the testimony, counsel for the plaintiffs stated that the sellers had waived strict performance of the contract requiring the purchase of certain insurance. This matter had not been pleaded. Over objection of attorneys for respondents testimony was received concerning the purported waiver. Such testimony was categorically denied by testimony introduced on behalf of the respondents. Prior to the trial and during the trial no contention was made that any waiver had been had concerning strict performance of the contract as to the payment of moneys due under the terms of the contract. No evidence was offered at the trial on behalf of the plaintiffs to support any contention of waiver of strict performance as to payments required by the terms of the contract. A witness on behalf of respondents Lentz testified to the effect that upon his return from his work as a commercial fisherman (sometime in the month of August, 1954) he found that the contract was in default with reference to payments due and with reference to insurance required by the contract and that he imme-

diately notified the plaintiffs, as buyers, that unless the defaults were corrected in both respects in a reasonable time that he would terminate the contract according to its terms. No answer or rebuttal was made to this testimony. After testimony had been completed and the matter submitted to the Judge for decision plaintiffs' attorneys filed a memorandum in which they first made claim that the provision of the contract providing that "time was of the essence" had been waived by the sellers insofar as the payments were concerned and reiterated their contentions made at the time of the trial that such provisions of the contract had been waived by the sellers as to the insurance requirements of the contract.

On this state of the record and the proceedings the trial court specifically found that the contract had been breached by the plaintiffs, as buyers, and that the contract had been terminated according to its terms, both as to required payments and as to the duty to procure insurance, and that the defendants Henry Anderson and Eni Anderson were entitled to immediate possession of the premises and were entitled to recover rentals for the premises collected by the plaintiffs after the termination of the contract and up to the time of the trial. The court further quieted title to the premises in the defendants Henry Anderson and Eni Anderson.

Petitioners as plaintiffs objected and excepted to the proposed Findings of Fact and Conclusions of Law and Decree and such objections were argued to the Court. Subsequently, the Findings of Fact and Con-

clusions of Law were signed and Decree in favor of the respondents, as defendants, and against the petitioners, as plaintiffs, was entered by the court on November 1, 1956.

On the 7th day of November, 1956, petitioners, as plaintiffs, filed a motion for new trial and to set aside all orders, purported Findings of Fact and Conclusions of Law and Decree on the ground that the Honorable Edward P. Murphy was not entitled to sit as a judge of the District Court for the District of Alaska, and claiming that the matter was jurisdictional and that all proceedings before the Honorable Edward P. Murphy were void and not binding on the plaintiff. Such motion for new trial also contended the case was an equity case, that the contract was not, in fact, in default, and alleged that the opinion, Findings of Fact, Conclusions of Law and Decree were unsupported by any competent evidence and were contrary to the law and equity in the case. This motion was overruled by the Honorable Edward P. Murphy as judge.

Appeal was had to the United States Court of Appeals for the Ninth Circuit. Since the matter was of extreme importance to the District Court for the District of Alaska and to the litigants before such court with reference to the claim made that United States District Judges could not sit as judges for the District Court for the District of Alaska, the Court of Appeals entered an order that the matter should be heard and decided on typewritten record and typewritten briefs. The record consists of Volume I, being

the records of the Clerk of the District Court, including all pleadings, all exhibits, interrogatories and answers thereto, requests for admissions and answers thereto, minute orders of the District Court, the various motions made to the pleadings, Findings of Fact and Conclusions of Law, Decree, motion for new trial, trial memorandums and other memorandums in support of contentions of the respective parties, including the memorandum in support of the motion for new trial. Volume II of the record is the typewritten reporter's transcript of the proceedings at the time of the trial.

The matter was argued to the United States Court of Appeals on behalf of both parties and resulted in the opinion and the order of the Court of Appeals set forth in the appendix to the petition. Petition for rehearing in the Court of Appeals was filed by petitioners herein and order denying that petition is likewise included in the appendix attached to the petition.

Respondents take exception to certain statements made by petitioners in their Statement of Matters Involved (pages two, three and four of the petition) and certain statements of purported facts made by petitioners in their argument, "Supporting second contention why the writ should be granted" found on page twelve of the petition. At page two of the petition petitioners state that the action was commenced for the purpose of preventing a threatened forfeiture of a contract of sale which grew out of a contract of sale originally executed by Raymond V. Lentz and Shirley Lentz for the sale of such property to Mr. and Mrs.

Westergard, who are not parties to this action, and which contract of purchase reached the possession and ownership of J. C. Reynolds and Agnes M. Reynolds. There isn't any evidence in the record whatsoever to support this statement. As a matter of fact the Westergard contract was a separate contract from the contract herein concerned and had nothing at all to do with such contract. It had been terminated before the contract here concerned was made. There isn't any evidence at all to support the contention that the Westergard contract ever came into the possession or ownership of J. C. Reynolds and Agnes M. Reynolds. As a matter of fact, and as will affirmatively appear from the record, the buyers under the Westergard contract defaulted under the terms of that contract and returned the property to the possession of Mr. and Mrs. Lentz, as sellers. Subsequently petitioners herein made an offer to purchase the property for the balance then remaining unpaid to the sellers under the terms of the Westergard contract and that offer was accepted and the contract with which we are here concerned was executed between Mr. and Mrs. Lentz, as sellers, and Mr. and Mrs. Reynolds, as buyers. A duplicate original of the contract of sale with which we are here concerned is a part of the record in this case.

On page three of their petition petitioners allege that the contract of sale herein concerned provided that the buyers would pay $150.00 per month. At a matter of fact, the contract provided that the purchasers would pay $150.00, or more, per month. This

is important in view of the claim made by the purchasers that they had prepaid a portion of the payments due under the terms of the contract.

Also, on page three of their petition petitioners claim that "prior to the attempted forfeiture" the balance had been reduced by the payment of $1,929.01, in addition to the down payment. As a matter of fact, and as specifically found by the trial court, the purchasers (the petitioners here) had paid exactly $625.00 over and above the down payment at the time the contract was terminated, including both principal and interest payments. This finding was made on the basis of contradictory testimony given on behalf of the parties at the time of the trial.

In several places in their petition, particularly on pages two and three thereof, petitioners refer to the "threatened forfeiture" and the "attempted forfeiture" of the contract. As a matter of fact, and as will appear conclusively from the record, the contract was not forfeited but was terminated according to its terms and as found by the trial court was terminated because of defaults and breaches of the provisions of the contract by the buyers.

On page three of the petition petitioners claim that the sellers did not deposit the agreement in the Bank of Homer on the 8th day of April, 1954, "as agreed", but did deposit it in the month of September, 1954. As a matter of fact, a perusal of the agreement will show that no agreement was made to deposit the agreement at any particular time. It was deposited

in escrow and all through their pleadings petitioners as plaintiffs alleged that the contract and deed had been duly deposited in escrow according to the terms of the agreement. In any event, when this matter was raised at the time of the trial the trial judge specifically invited the plaintiffs to give any testimony that they might have as to any claim that failure to deposit the agreement with the escrow holder prior to the month of September had in any way prejudiced the buyers or had in any way caused or induced the breaches of the contract by the buyers or had any bearing at all on the breaches of the contract by the buyers. No such evidence was offered.

On pages three and four of their petition petitioners purported to set forth certain evidence received on behalf of the plaintiffs. The record will disclose that those contentions of the plaintiffs were specifically denied by testimony on behalf of the respondents at the trial and that the trial court made specific findings on the matter after hearing the contradictory testimony.

On page four of their petition petitioners claim that an insurance policy in the amount of $5,500.00 was taken to the bank and another policy of $5,500.00 was purchased but was not deposited in the bank. As a matter of fact, there is no evidence at all that any policy or policies of insurance were ever deposited with the escrowee bank. On the contrary the evidence stands undisputed that no policy ever was deposited with such bank. The only evidence concerning another policy is

that upon the expiration of the first policies that a second policy or policies in the same amount were purchased for an additional year. These second policies did not contain the contract clause in behalf of the sellers but in answer to interrogatories and in answer to request for admissions the plaintiffs agreed to have such clause inserted in the second policies. It is not of record, but for the information of the court, respondents have been notified that these second policies have been cancelled for nonpayment of premium.

There is no evidence whatsoever in the case to justify the statements made on page four of the petition to the effect that "then Mr. and Mrs. Lentz were offered $10,000 and went to the bank and demanded the papers". As a matter of fact, the only evidence in the record is to the effect that the contract was terminated according to its terms at the request of the sellers on the 11th day of October, 1954, because of breach of the agreement by the buyers and that thereafter the defendants Lentz sold the property to the defendants Henry Anderson and Eni Anderson.

On page twelve of their petition petitioners use the expression "the defendants' hands being slimy with fraud and having obtained the deed and contract from the escrowee by misrepresentation . . ." There is no evidence of any kind in the record which imputes or even attempts to impute any fraud to the defendants. Likewise, there is no evidence whatsoever to justify the statement of petitioners on page twelve of their petition that more than two-thirds of the purchase and

sale price of the property had been received by the sellers. As a matter of fact, and as hereinabove more particularly set forth, only the sum of $625.00 over and above the down payment was paid by the buyers on the contract prior to the termination of the contract.

II.

SUMMARY OF ARGUMENT.

As provided by the Rules of this court certiorari is a matter of sound judicial discretion and not a matter of right. Petitioners have shown no important reason and, in fact, have shown no reason at all as to why they should be entitled to a Writ of Certiorari and their petition should be denied.

The contentions of petitioners are embraced in two propositions. The first is that the assignment of the Honorable Edward P. Murphy to sit as a judge of the District Court for the District of Alaska was without authority and void and that the matter was jurisdictional and could not be waived by petitioners and that, accordingly, the judgment entered in this matter was a nullity. The second is that the judgment rendered by the District Court for the District of Alaska and affirmed by the Court of Appeals for the Ninth Circuit was inequitable and amounted to the taking of property of petitioners without due process of law because it is claimed respondents Lentz, as sellers, waived strict performance of the contract of sale and should have given notice before forfeiting the contract.

The first proposition is without merit because the designation of Judge Murphy was valid or because if there was any defect in such designation that petitioners had and have no right or authority to question such designation. As an alternative, even if it were conceded the designation of Judge Murphy was subject to question by petitioners Judge Murphy was acting as a judge de facto, if not a judge de jure. Jurisdiction is in the court and not in the judge. The court had unquestioned jurisdiction of the subject matter of the suit and of all the parties. If the designation of Judge Murphy to sit as a judge of the District Court for the District of Alaska was irregular in any respect petitioners waived any possible claim they might have to question any possible irregularity that may have existed by their submission of the matter without objection to the court presided over by Judge Murphy.

All of the contentions now made by petitioners concerning alleged inequities and alleged taking of property without due process of law were submitted to the trial court and to the Court of Appeals. The trial court found that petitioners as buyers breached the contract of sale in two respects and found that the contract was terminated according to its terms and by reason of the breaches thereof by the buyers. Such findings were made by the court on substantial and contradictory evidence. Under the provisions of the Federal Rules of Civil Procedure such findings may not be set aside unless clearly erroneous. Petitioners have not shown that such findings are clearly erroneous or erroneous at all. The matter now stands adjudi-

cated between the parties. The principles of equity are important but equity contemplates that both parties will be treated fairly and justly and not that one party will be protected irrespective of the rights of the other party. Petitioners as buyers had the right to buy certain property under the terms of a written contract. The contract provided that in the event the buyers should default under its terms that the contract would be terminated because of such breaches or defaults. The buyers breached the terms of the contract and did default under the terms of the contract. The contract was terminated by reason of such breaches and default. Petitioners have had their day in court and the court has found adversely to their contentions. They have no right to a redetermination of the matter by this court.

III.

ARGUMENT.

Petitioners in their petition have listed eight reasons for requesting the granting of a Writ of Certiorari. The first, third, fourth and fifth reasons have to do with the so-called jurisdiction of the District Judge who tried this matter. The second reason is general. The sixth reason given is to the effect that the action was an equity action, that the petitioners did equity and equity was denied to petitioners and that this constituted deprivation of property without due process of law. The seventh and eighth reasons are to the effect that petitioners protected their record in the

District Court and argued the matter before the Court of Appeals and that they feel that they have been deprived of their property without due process of law and in contravention of the decisions of the United States Supreme Court.

Respondents believe that only one question is before the court at this time. That question is as to whether petitioners have shown any reason at all for granting a Writ of Certiorari. Respondents believe that petitioners have shown no such reason and that the petition should be denied.

Rule nineteen of the revised Rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and as amended to the present date, insofar as here material, reads as follows: "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." See *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70; *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175; *Magnum Import Co. v. Coty,* 262 U.S. 159; *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387. Petitioners here have not shown or even attempted to show any special or important reasons for granting the Writ for which they have prayed.

All of petitioners' various contentions can be summed up into two propositions as follows: First, that there is no legal authority for the Chief Judge of the United States Court of Appeals for the Ninth Cir-

cuit to assign a United States District Judge to sit as a Judge of the District Court for the District of Alaska and that, accordingly, the attempted assignment of the Honorable Edward P. Murphy, a United States District Judge, to sit as a judge of the District Court for the District of Alaska was void and of no effect and that Judge Murphy had no jurisdiction to sit as a Judge of the District Court for the District of Alaska and that all actions taken and done by him while acting as a Judge of the District Court for the District of Alaska are void. The contention is that the matter is jurisdictional and cannot be waived. It follows then that if petitioners' contention is sound the proceedings in this case beginning with the trial are a nullity and that the decree entered by the trial court and affirmed by the Court of Appeals is void.

The second contention of petitioners is that the case with which we are here concerned is an equity case and that the plaintiffs, petitioners here, did not receive equity in the District Court or in the United States Court of Appeals and that, accordingly, property belonging to petitioners has been taken without due process of law.

At the outset respondents wish to point out that both of the contentions of the petitioners as above set forth have been raised by petitioners as plaintiffs and as appellants, both in the District Court for the District of Alaska and in the Court of Appeals, and the matters have been fully argued to both of such courts, and petitioners have been overruled on both of such contentions by the District Court and by the Court of Appeals.

Respondents contend that petitioners have not even attempted to bring themselves within any of the reasons for granting a Writ of Certiorari as suggested in subsections (a) and (b) of Section 1 of Rule nineteen of the revised Rules of the Supreme Court of the United States of America hereinabove cited, and that petitioners have shown no reason at all as to why they should be allowed to litigate the matters herein concerned for a third time.

Petitioners have cited three cases for the proposition that the District Court for the District of Alaska is not a United States District Court. Two of such cases have to do with the District Court for the District of Columbia and seem to have no bearing at all on the question. However, respondents concede that the District Court for the District of Alaska is not a United States District Court either in the Constitutional sense or traditionally. Having conceded that the District Court for the District of Alaska is not a United States District Court it does not follow, as argued by petitioners, that there is no statutory or other authority for the Chief Judge of the United States Court of Appeals for the Ninth Circuit to assign temporarily a District Judge of the Circuit to hold a District Court in the District of Alaska under the provisions of Title 28 U. S. Code section 292 (b). Even though conceding that the District Court for the District of Alaska is not a United States District Court several cases have held that it is a District Court of the United States for certain particular purposes. May we call attention to *International Long-*

shoremen and Warehousemen's Union v. Juneau Spruce Corporation, 82 F. Supp. 224, 12 Alaska 260, affirmed by the United States Court of Appeals for the Ninth Circuit, 89 F. 2d 177, and affirmed by United States Supreme Court at 342 U.S. 237. This court there held that the District Court for the District of Alaska was a District Court of the United States within the meaning of the provisions of Section 303 (b) Title 29 U.S.C. See also *United States v. Barbeau,* 92 F. Supp. 449, 13 Alaska 9, where it was held that the District Court for the District of Alaska was a court of the United States to the extent that it had power to allow appeals forma pauperis in criminal cases under a statute which provided that, "any court of the United States may authorize . . ." See also *United States of America v. King,* 119 F. Supp. 398, 14 Alaska 500, where it was held that the District Court for the District of Alaska had jurisdiction to entertain a claim under the so-called "Tucker Act" which provides in brief that "the District Courts" shall have jurisdiction to entertain certain suits against the United States of America.

We have been able to find no cases holding specifically that section 292 of Title 28 U.S.C. either authorizes or does not authorize the Chief Judge of the United States Court of Appeals for the Ninth Circuit to assign United States District Judges to sit as judges of the District Court for the District of Alaska. However, it would appear from a reading of the statute involved that the Chief Judge has such power. In their petition petitioners claim that Title

48 U.S.C. section 101 established and named the court the District Court *for the Territory of Alaska*. As a matter of fact a reading of the section will disclose that the court established by such section is the District Court for the District of Alaska. The court so established has all the jurisdiction of district courts of the United States, together with general jurisdiction in civil, criminal, equity and admiralty causes. In other words, it has all the jurisdiction of any United States District Court plus other jurisdiction. Contrary to the statement of petitioners on page nine of their petition the salary of the District Judge for the District of Alaska is exactly the same as the salary of judges of the United States District Courts. See Title 28 U.S.C. 135, as amended, as to United States District Judges and 48 U.S.C. 101, as amended, as to Judges of the District Court for the District of Alaska. Petitioners quote from section 101 of Title 48 U.S.C. that portion of the section which requires District Judges during their terms of office to reside in the divisions of the district to which they may be respectively assigned by the President. This section for all practical purposes is the same as subsection (b) of section 134 of Title 28 U.S.C. which requires a United States District Judge to reside in the district, or one of the districts, for which he is appointed.

There appears to be no logical reason at all as to why the Chief Judge of the United States Court of Appeals for the Ninth Circuit should not be empowered to designate and appoint a United States District Judge of his circuit to hold a District Court

in the District of Alaska. By statute Alaska and California are in the Ninth Circuit. Title 28 U.S.C. section 41. Literally then the Chief Judge of the Ninth Circuit under section 292 (b) Title 28, above cited, in assigning a District Judge of the District of California to hold court in the District Court for the District of Alaska has assigned a District Judge of the circuit to hold a district court in a district within the circuit.

Respondents have cited no cases or any authority at all in support of their argument that the Chief Judge of the United States Court of Appeals for the Ninth Circuit had no authority to assign the Honorable Edward P. Murphy to sit as a judge of the District Court for the District of Alaska.

We believe that this court will take judicial notice of the fact that the District Court for the District of Alaska is hopelessly undermanned by reason of the failure of Congress to establish additional judgeships for that court and that, accordingly, the calendars of that court are hopelessly bogged down. We submit that the purpose of section 292 (b) Title 28 U.S.C. is largely, if not entirely, to provide for the use of the manpower of the federal judiciary to the best possible advantage, with particular reference to attempting to give aid to courts which are not able to keep up with the work in hand and in order that justice may be done to parties litigant. Certainly if any court ever needed help the District Court for the District of Alaska is that court and petitioners' highly technical argument, unsupported by cases and

unsupported by logic or reason, should carry no weight at all.

While we have been unable to find any cases at all on the power or on the propriety of the assignment of United States District Judges to sit as judges of the District Court for the District of Alaska this court has several times passed upon the assignment of district judges under section 292 (b) Title 28 U.S.C. and its predecessor statutes. This court has repeatedly held that parties litigant have no standing to question an assignment so made or the authority of a judge to act pursuant to such assignment. We call the court's attention specifically to *Ball v. United States,* 140 U.S. 118 and *McDowell v. United States,* 159 U.S. 595. These cases were cited to the Court of Appeals by respondents and were cited by the Court of Appeals in its opinion but have been completely ignored by petitioners. See also *ex parte Ward,* 173 U. S. 452 cited by the Court of Appeals in its opinion.

In addition to the proposition that petitioners have no standing to question the assignment of the Honorable Edward P. Murphy to sit as a judge of the District Court for the District of Alaska it is apparent that Judge Murphy in trying this case was a judge de facto if not in fact a judge de jure. As disclosed by the record Judge Murphy was assigned to try this case on July 11, 1956. The trial was not held until October 24, 1956, more than three months later. Petitioners made no objection to the assignment of Judge Murphy to try the case and tried

the case to Judge Murphy without objection. After the case had been tried and completely argued by the parties and after judgment had been entered adversely to petitioners they first attempted to raise the question that Judge Murphy had no authority to act as judge. It seems clear that petitioners waived any right that they might have had to object to the trial of the case by Judge Murphy if, in fact, they had any right to object. See 30 Am. Jur., "Judges" sub-title "De Facto Judges", section 100, page 804, and cases there cited, and section 102, pages 806 and 807, and cases there cited.

Petitioners in claiming that Judge Murphy was without jurisdiction and that, accordingly, his actions were void, overlook the fact that jurisdiction is not in the judge but in the court. See 14 Am. Jur., "Courts", section 10, page 253, and cases there cited. There is no question at all but that the District Court for the District of Alaska had jurisdiction of the subject matter of the action and of all the parties to the action. No contention to the contrary has been made.

For the reasons either that petitioners had and have no standing to question the validity of the designation of Judge Murphy or his right to sit as a judge of the District Court according to the rule of the *McDowell* and *Ball* cases, above cited, and as found by the Court of Appeals in its opinion, or for the reason that Judge Murphy was a de facto if not a de jure judge and that petitioners as plain-

tiffs waived any right to question his authority to sit as judge, it seems clear that petitioners' first contention is without merit.

Eighteen of the twenty-one cases cited by petitioners in their petition are to the effect that strict performance of a contract can be waived by the parties and that in the event of waiver that the sellers must give the buyers a reasonable time to put the contract into good standing before the sellers may terminate the contract. Respondents have no quarrel with these cases under the factual situations involved in such cases and will concede that the propositions of law set forth in such cases are sound. It does not follow that petitioners are entitled to further litigate this matter under the factual situation here presented. Although the question of waiver, at least insofar as payments are concerned, was not raised prior to the trial or at the time of the trial, it was raised both as to the question of payments and as to the question of securing insurance as provided by the terms of the contract, while the matter was still before the District Court. The District Court made specific findings to the effect that the petitioners as buyers breached the terms of the contract in both respects. Such findings are based on substantial disputed evidence and are no longer open to question under the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure which requires a showing that a finding by a trial judge was clearly erroneous before such finding may be set aside. Petitioners have made no attempt to show that such

findings were clearly erroneous or erroneous at all. They have limited their contentions to a general claim that the actions of the District Court were inequitable and the record does not support their contention.

Although the question of waiver was not before the court at the time of the trial, except possibly as to the insurance feature of the contract, the only evidence on behalf of the petitioners concerning claimed waiver was the testimony of petitioner J. C. Reynolds. That testimony was specifically denied by testimony on behalf of respondents. The trial court found in favor of the respondents Raymond V. Lentz and Shirley Lentz as sellers.

As previously pointed out there isn't any evidence at all in the record to support any claim of waiver by the sellers of the provisions of the contract concerning payments to be made. On the contrary the evidence stands undisputed and, in fact, petitioner J. C. Reynolds testified that respondents repeatedly requested him to make payments on the contract in question. The only evidence in the record which might bear on waiver of payments and concerning notice given by the sellers to the buyers of default and intention to terminate the contract according to its terms, is the testimony of respondent Raymond V. Lentz, where he testified that upon his return from the fishing grounds in the month of August of 1954, when he discovered the defaults, he immediately called the attention of the buyers to such defaults both as to the matter of their failure to procure insurance and as to the matter of the non-payment

of the amounts required to be paid by the contract and at that time he advised the buyers that unless the contract was put into good standing in both respects within a reasonable time thereafter that he would terminate the contract according to its terms. The petitioners as buyers failed to put the contract into good standing and the contract was terminated on October 11, 1954, approximately sixty days after such notice. Thus, it would appear that even if we were to concede that the buyers were entitled to some sort of notice of default, and under the facts here presented we do not believe they were so entitled, they had notice and were warned of the intention of the sellers to terminate the contract unless it was put into good standing within a reasonable time. A reasonable time elapsed without the contract having been put into good standing by the buyers and the contract was properly terminated under its terms for breach of contract by the buyers as found by the trial judge. See discussion of Rule 52 of the Federal Rules of Civil Procedure in Barron and Holtzoff Federal Practice and Procedure, Rules Edition, section 1131 under the heading "Presumptions on Appeal" and cases there cited and section 1133 of the same work under the heading "Clearly Erroneous" and cases there cited.

Petitioners in claiming that they have been deprived of their property without due process of law overlook two things. In the first place the property never belonged to them. They made a contract under which they were entitled to purchase the property if they did certain specified things and were to lose

any right to buy the property if they did not do those things. They breached the contract and under the terms of the contract lost the right to buy the property. In the second place the petitioners have had full benefit of all of the processes of the law. They were allowed to present their case completely. In fact, they were allowed to testify to a claim of waiver of strict performance as to their duty to procure insurance although that contention was not pleaded and was not properly before the court. After the trial was completed they were allowed to claim that strict performance of the contract had been waived as to payments required by the contract although that contention had not been advanced in the pleadings or at all until after the evidence had been completed and at a time when the sellers could not offer evidence to rebut the claim. Both the trial court and the Appellate Court considered both these matters. Equitable principles are of the utmost importance, of course, but the seller is as much entitled to equity as the buyer. A mere claim of lack of equity unsupported by the evidence and not specified as to its nature is not entitled to any credence. May we call the attention of the court to the case of *Harmon v. Walsh,* 228 P. 2d 333, decided by the District Court of Appeal of California in 1951. On the factual situation that case is very similar to the one we are here considering and the buyers made the same contention regarding the principles of equity as are here being made by petitioners. The court in considering that argument used the following language:

"Appellants' brief contains many references to the principles of equitable relief, and aver that great injustice will result if specific performance of the agreement of sale be not ordered. In this connection appellants allege willingness and ability to perform, and that 'they have in good faith fully performed', at least substantially. It is well to bear in mind, however, that equity is concerned with the rights of both buyer and seller.

"Here appellants went into immediate possession of the property upon a small payment of $100.00 and a promise to make regular monthly payments of a like amount. The sellers under this written contract had a right to expect such payments to be made as therein specified. Under the interpretation sought by appellants, however, respondents would be obliged to accept almost any payment tendered, on the assumption that sooner or later appellants would make up the deficit, an arrangement entirely different from that specified in the written instrument. The principles of equity, important as they are, do not comprehend such an impairment of contract obligation.

"The trial court had before it various conflicting contentions in evidence relating thereto. It cannot be said that the findings and judgment adverse to appellants' contentions are either unsupported by substantial evidence or contrary to law."

Petitioners have had their day in court. The trial court, after having considered all the evidence and having considered all of the contentions now made

by petitioners in their petition, decided against those contentions and in favor of the respondents. Petitioners then took the case to the Court of Appeals and the matter was fully briefed and argued by all parties. The Court of Appeals found against the contentions of the petitioners. In the words of the opinion of the Court of Appeals:

> "The court is of the opinion that there is no error in this respect. The contract provided that time was of the essence here and that the sellers, defendants here, should be released from all obligations to convey the property in case of the failure of the buyers to make any of the payments when due or to perform any of the covenants contained in the contract. The record shows and the court found that although the contract was made on the 8th day of April, 1954, and required the purchasers to keep the buildings on the property described in the contract insured in standard insurance companies, to be approved by the sellers, in an amount not less than $6,500.00, with loss payable to the sellers, and to deliver the insurance policies to the escrow holder, yet no policies were procured until October 10, 1954, and then only in the amount of $5,500.00, and these were never deposited with the escrow holder. The sellers elected to terminate the contract on October 11, 1954.
>
> "We find no error in the judgment of the court below and accordingly it is affirmed."

We believe that petitioners have shown no ground for issuance of a Writ of Certiorari under their "second contention."

IV.

CONCLUSION.

Respondents believe that petitioners have failed in any respect to show that they are entitled to have this matter reviewed by the Supreme Court of the United States of America. Certiorari is a matter of discretion and not a matter of right. The burden is on petitioners to show some special or important reason which would justify intervention by the Supreme Court of the United States of America. They have shown no such reason and the petition for Writ of Certiorari should be denied.

Dated, Anchorage, Alaska,
June 10, 1957.

DAVIS, HUGHES & THORSNESS,
By EDWARD V. DAVIS,
Attorneys for Respondents Raymond V. Lentz and Shirley Lentz.

RALPH E. MOODY,
Attorney for Respondents Bank of Homer and William L. Mathews.

J. EARL COOPER,
Attorney for Respondents Henry Anderson and Eni Anderson.